IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 543.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

NOTICE AND MOTION TO SUBSTITUTE PARTIES.

E. J. DIMOCK,
Counsel for Petitioners.

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JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

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To BENJAMIN W. MOORE, Esq.,
30 South Broadway,
Yonkers, New York,
Counsel for Respondent.

SIR:

PLEASE TAKE NOTICE that on the 5th day of February, 1940, or as soon thereafter as counsel can be heard, the within motion to substitute John J. Condon, Mayor, Gustav

W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, now constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, as petitioners herein, as successors to and in the place and stead of Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety, respectively, will be submitted to the Supreme Court of the United States.

A printed copy of the motion to substitute is served upon you herewith.

E. J. Dimock
Counsel for Petitioners.

Due and timely service accepted
this 25th day of January, 1940.

Benjamin W. Moore
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 543.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

MOTION TO SUBSTITUTE PARTIES.

COME NOW the petitioners in the above entitled cause, and move that John J. Condon, Mayor of the City of Yonkers, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, be substituted as petitioners therein in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of

Yonkers, and Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers, and in support of this motion make the following brief statement of the matter involved, and the reasons relied upon for the substitution:

I.

This application is made under and pursuant to Section 780 of Title 28 U. S. C. (§11, 43 Stat. 941; Feb. 13, 1925).

II.

On November 20, 1939, Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, filed in this Court their petition for certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered on August 22, 1939. On December 18, 1939, this Court granted certiorari (84 L. ed. 250).

III.

The Police Pension Fund of the City of Yonkers is created and its administration provided for by Local Law No. 1-1931 of the City of Yonkers, which provides, so far as is material to this motion, as follows:

"CITY OF YONKERS

LOCAL LAW No. 1-(1931)

A LOCAL LAW OF THE CITY OF YONKERS TO AMEND AND SUPERSEDE ARTICLE XI, POLICE PENSION FUND OF THE SUPPLEMENTAL CHARTER OF SAID CITY, CONTAINED IN CHAPTER 452 OF THE LAWS OF 1908, AS

AMENDED, ENTITLED 'AN ACT TO SUPPLEMENT THE GENERAL LAWS RELATING TO THE GOVERNMENT OF THE CITY OF YONKERS, AND TO REVISE AND CONSOLIDATE THE LOCAL LAWS RELATING THERETO.'

Be it enacted by the Common Council of the City of Yonkers, as follows:—

Section 1. Article XI, Police Pension Fund of the Supplemental Charter of the City of Yonkers, N. Y., being part of Chapter 452 of the Laws of 1908 as amended, entitled 'An act to supplement the general laws relating to the government of the City of Yonkers, and to revise and consolidate the local laws relating thereto,' is hereby amended and superseded to read as follows:

Section 1. The Mayor, the Comptroller and the Commissioner of Public Safety and their successors in office, shall constitute a board of trustees of the Police Pension Fund; and they shall have the care, control, management and distribution of said funds as provided by law. The Comptroller shall be the custodian of the said fund, and the City Treasurer shall be the treasurer thereof."

The entire Local Law is set forth in the transcript of record heretofore filed herein on pages 109 to 118, inclusive.

IV.

On December 31, 1939, the terms of office of Joseph F. Loehr, as Mayor of the City of Yonkers, and Dennis M. Morrissey, as Commissioner of Public Safety of the City of Yonkers, expired, and on January 20, 1940, James J. Hushion retired from the office of Comptroller of the City of Yonkers.

V.

On January 2, 1940, John J. Condon succeeded said Joseph F. Loehr, as Mayor of the City of Yonkers, having on that date been duly chosen for such office by the Common Council of said City of Yonkers acting under the authority of the following provisions of Section 5 of Article XV of the Supplemental Charter of the City of Yonkers (Chap. 452, Laws of New York, 1908, as amended by a Local Law duly adopted by the Electors of the City of Yonkers at a general election held in said City on November 8, 1938):

> "SECTION 5. *Mayor.* The elective offices of the city other than the offices of councilman, supervisor, two city judges and four justices of the peace, are hereby abolished. The common council elected in 1939 and each newly elected common council thereafter shall at its first meeting choose one of its members as presiding officer, who shall have the title of mayor."
>
> "• • •"

VI.

On January 2, 1940, Raymond J. Whitney was duly appointed City Manager of the City of Yonkers by the Common Council of the City of Yonkers, pursuant to authority duly vested in them, and on January 3, 1940 assumed the duties of his office as City Manager. In and by the Charter of the City of Yonkers (Chap. 452, Laws of N. Y. 1908, as amended by a Local Law duly adopted by the Electors of the City of Yonkers at a general election held in said City on November 8, 1938), it is provided, among other things, as follows:

"ARTICLE XVI.

THE CITY MANAGER.

"SECTION 1. *Existing Departments of the City.* The existing departments, divisions and boards of the city government are continued unless changed by the provisions of this amendment: Except as in this amendment otherwise provided, the common council shall have and possess all the powers of and shall either perform or supervise and provide for the performance of all the duties heretofore imposed upon the common council, the various city departments, city boards and commissions, the heads of city departments and all other officers of the city whether elective or appointive. Except as established by the provisions of this amendment, the common council may change, increase, reduce, abolish, combine, and rearrange the departments, divisions and boards of the city government.

"SECTION 2. *City Manager.* The common council shall appoint a city manager, who shall be the chief executive and administrative officer of the city. The city manager shall be chosen by the common council solely on the basis of his executive and administrative qualifications with special reference to his actual experience in or knowledge of accepted practice in respect to the duties of his office as hereinafter outlined. No persons elected to the common council shall be chosen as city manager during the term for which he was elected.

"• • •

"SECTION 4. *Responsibility of Managers—Powers of Appointment and Removal.* The city manager shall be responsible to the common council for the proper administration of all the affairs of

the city placed in his charge, and to that end, subject to any existing provisions as to term of office, conditions of removal, or compensation, as may be imposed by state law, shall have the power to appoint and remove all heads of departments including the comptroller and other officers and employees in the administrative service of the city and to fix their salaries subject to any limitation which the common council may impose; but the manager may authorize the head of a department or office responsible to him to appoint and remove subordinates in such department or office. The city manager himself may act as head of a department when in his judgment the appointment of another person to such office is not necessary. Appointments made by, or under the authority of, city manager shall be on the basis of executive and administrative ability and of the training and experience of such appointees in the work which they are to perform. All such appointments shall be without definite term, unless for provisional, temporary or emergency service.

"Every administrative officer or employee who is in office at the time this amendment takes effect shall continue in office until the city manager or other person duly authorized by the city manager shall appoint a successor to such administrative officer or employee unless such administrative office or position be abolished by the common council and except that in the case of death or incapacity of the incumbent or of his refusal to act, the common council may fill such vacancy by temporary appointment."

VII.

The Comptroller is the head of the Department of Finance (Article III-A, §1, Charter of the City of Yonkers, Chap. 452, Laws of N. Y., 1908, as amended by Chap. 667, Laws of 1933). The Commissioner of Public Safety is the head of the Department of Public Safety (N. Y. Second Class Cities Law, §130).

VIII.

On January 22, 1940, pursuant to authority vested in him by Section 4 of Article XVI of the Charter of the City of Yonkers, *supra,* Raymond J. Whitney, City Manager, designated Gustav W. Klein, Jr., First Deputy Comptroller, as Acting Comptroller of the City of Yonkers. Gustav W. Klein, Jr. as First Deputy and Acting Comptroller, has assumed and is now performing all of the duties and exercising all of the powers of Comptroller, and is the successor in office of James J. Hushion, former Comptroller.

IX.

On January 3, 1940, pursuant to the authority duly vested in him by Section 4 of Article XVI of the Charter of the City of Yonkers, *supra,* Raymond J. Whitney, City Manager, duly made it known that in his judgment it was unnecessary to appoint another person to the office of Commissioner of Public Safety of the City of Yonkers and has, since January 3, 1940, acted as Commissioner of Public Safety of the City of Yonkers, and as such is the successor

in office to said Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers.

X.

There is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved therein. From Local Law No. 1—(1931) heretofore set forth in full in paragraph numbered III, it appears that the persons who constitute the Board of Trustees of the Police Pension Fund of the City of Yonkers are so constituted by reason of the office which they hold in the municipal government of the City of Yonkers. The individuals constituting such Board of Trustees have no personal interest in the fund which is held for the benefit of the policemen of the City of Yonkers. The termination of the terms of office of Joseph F. Loehr as Mayor, James J. Hushion as Comptroller, and Dennis M. Morrissey as Commissioner of Public Safety in no way renders the issues involved in this cause academic, and has in no way relieved the necessity for a decision by this Court upon the issues involved therein.

XI.

The said John J. Condon, Gustav W. Klein, Jr., and Raymond J. Whitney have been advised of the making of this motion and have consented thereto, as appears from their written consent attached hereto as Exhibit A.

XII.

The said Joseph F. Loehr, James J. Hushion, and Dennis M. Morrissey have been advised of the making of this motion and have consented to the substitution of said John J. Condon, Gustav W. Klein, Jr., and Raymond J. Whitney in their place and stead as prayed for herein, as appears from their written consent attached hereto as Exhibit B.

XIII.

Less than six months have expired since the terms of office of said Joseph F. Loehr, and Dennis M. Morrissey expired and since said James J. Hushion retired, and there is no provision in the law of the State of New York limiting the time within which the application may be made.

WHEREFORE, petitioners pray that John J. Condon, Mayor of the City of Yonkers, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers now constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, be substituted herein as petitioners, in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of Yonkers, and Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers; that John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the

City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, be permitted to continue and maintain this cause; and that the title of the cause be amended to read:

"JOHN J. CONDON, Mayor, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller and RAYMOND J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, Petitioners, against WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation."

Respectfully submitted,

E. J. DIMOCK
Counsel for Petitioners.

Dated: January 24, 1940.

Exhibit A.

We, JOHN J. CONDON, Mayor of the City of Yonkers, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller of the City of Yonkers, and RAYMOND J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, have read the foregoing motion praying that we be substituted in the place and stead of Joseph F. Loehr, former Mayor of the City of Yonkers, James J. Hushion, former Comptroller of the City of Yonkers, and Dennis M. Morrissey, former Commissioner of Public Safety of the City of Yonkers, in the said cause now pending before the Supreme Court of the United States, and we hereby consent to the continuance of said cause and to be substituted as petitioners therein.

Dated: Yonkers, New York, January 23, 1940.

JOHN J. CONDON
Mayor of the City of Yonkers.

GUSTAV W. KLEIN, JR.
First Deputy and Acting Comptroller of the City of Yonkers.

RAYMOND J. WHITNEY
City Manager, Acting as Commissioner of Public Safety of the City of Yonkers.

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 23 day of January, 1940, before me came JOHN J. CONDON, Mayor of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 23 day of January, 1940, before me came GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 23 day of January, 1940, before me came RAYMOND J. WHITNEY, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

Exhibit B.

We, JOSEPH F. LOEHR, former Mayor of the City of Yonkers, JAMES J. HUSHION, former Comptroller of the City of Yonkers, and DENNIS M. MORRISSEY, former Commissioner of Public Safety of the City of Yonkers, have read the foregoing motion praying that John J. Condon, now Mayor of the City of Yonkers, Gustav W. Klein, Jr., now First Deputy and Acting Comptroller of the City of Yonkers, and Raymond J. Whitney, now City Manager, acting as Commissioner of Public Safety of the City of Yonkers, be substituted respectively in our place and stead in the above entitled cause now pending before the Supreme Court of the United States, and we hereby consent to such substitution and to the continuance of the said cause by the said John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller and Raymond J. Whitney, City Manager, acting as Commissioner of Public Safety of the City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers.

Dated: Yonkers, New York, January 24, 1940.

JOSEPH F. LOEHR

JAMES E. HUSHION

DENIS M. MORRISSEY

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 24 day of January, 1940, before me personally came JOSEPH F. LOEHR, former Mayor of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 23 day of January, 1940, before me came JAMES J. HUSHION, former Comptroller of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

On this 24 day of January, 1940, before me personally came DENNIS M. MORRISSEY, former Commissioner of Public Safety of the City of Yonkers, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

ALLEN R. HENDERSON
Notary Public Westchester County
Com. expires March 30, 1941

(NOTARIAL SEAL)